Supreme Court, U.S.
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No. 93-64

In The Supreme Court of the United States

OCTOBER TERM, 1992

Bano Bi, Individually and on Behalf of the Children of Rashid Kahn, and as Representative of the Estate of Rashid Kahn, et al. and Abdul Wahid, et al.,

Petitioners,

against

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE
SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether - with all the implications for such important concepts as federalism, comity, abstention, removal/remand issues, federal/state relations and the limited power of the federal judiciary - the Supreme Court should grant certiorari in order to achieve a uniformity of decisions among the courts of appeals by resolving a recently created conflict between the Second and First Circuits, the Second Circuit holding in this case, Bano Bi v. Union Carbide Chemicals, 984 F.2d 582 (2nd Cir. 1993), that, after a case is removed from state to federal court and the federal district court holds there is no subject matter jurisdiction on the ground that the plaintiffs had no "standing" to sue, the federal court should dismiss the

case rather than remanding it to state court, and the First Circuit holding in M.A.I.N. v. Commissioner, Maine Department of Human Services, 876 F.2d 1051 (1st Cir. 1989) that, in the same basic situation, the federal district court should remand rather than dismissing? Involved in this inquiry is the important question of whether, once it is determined in a case removed from state court that the plaintiffs have no standing in the federal court, 28 U.S.C. 1447(c) absolutely mandates remand to state court or whether the district court has the discretion to dismiss, rather than remanding, if it determines that a remand would be futile?

II.

Whether the Supreme Court should grant certiorari in order to resolve an extremely important question of

removal/remand law and in order to achieve a uniformity of decisions among the courts of appeals by resolving conflicts between the Second and Fifth Circuits on the one hand and the Seventh Circuit on the other hand, the Second Circuit in this case and the Fifth Circuit in Villar v. Crowley Maritime Corp., 990 F.2d 1489 (5th Cir. 1993; split dec.; reh'g and reh'g en banc pending) holding that where a case has been filed in state court and then removed to federal court on the ground that diversity jurisdiction exists, and the plaintiffs timely move to remand the case on the ground that diversity jurisdiction does not exist, the federal district court can address other motions or issues such as the in personam jurisdiction motion and the question of standing, before addressing the remand motion, and the

decision of the Seventh Circuit in Allen V. Ferguson 791 F.2d 611 (7th Cir. 1961), holding that, under the same general circumstances as in Villar and this case, the federal district court should first address the remand motion and if it determines that the removing parties have not met their burden of showing that removal was justified, it should order the case remanded to state court, thus permitting the state court to address such matters as "standing" or "in personam jurisdiction"?

III.

Whether, in a case filed in the state court involving named defendants who would destroy diversity because either they are in-state defendants or they are alien defendants (and alien plaintiffs have been named), and the defendants remove the

case to federal court on the ground that all of the defendants who would destroy diversity have been "fraudulently joined", the Supreme Court should grant certiorari in order to address such important matters as the extent of the removing parties' burden to prove "fraudulent joinder" and whether, in a case such as this one where the defendants failed to clearly show that there was "no possibility" that a state court could have found liability against at least one of the in-state defendants, or in personam jurisdiction against at least one of the alien defendants, the federal district court should have remanded the case to the state court?

IV.

Whether, in a case such as this one, where the plaintiffs have filed suit in the state court and the defendants have

removed the case to federal court by asserting that the federal court had diversity jurisdiction, but, once the case has been removed, the defendants immediately ask the federal court to decline such jurisdiction and dismiss the case on ground of forum non conveniens, the federal district court, if it decides it should decline jurisdiction on such ground, should remand to the state court, rather than dismissing the case? The court, if it grants certiorari on this question, would also be resolving conflicts among the federal courts and other authorities. See Murray vs. Union Pac. Ry. Co., 77 F.Supp. 613 (D.C. Ill. 1948); Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974); 76 C.J.S. Removal of Cases, Sect. 266; 1A, Moore's Federal Practice, Removal Procedure, Sect.

0.169[1] pp. 684, 685; and the analogous "pendant jurisdiction" cases, e.g. Carnegie-Mellon v. Cohill, 108 S. Ct. 614, 621, 622 (1988) on the one hand, and Nolan v. Boeing, 919 F.2d 1058 (5th Cir. 1990) cert. denied, 111 S.Ct. 1587 (1991); Villar, supra; De Aguilar v. Boeing, 806 F. Supp. 139 (E.D. Tex. 1992) (pending appeal No. 92-5099 in the Fifth Circuit); and this case, on the other hand.

V.

Whether the Supreme Court should grant certiorari in order to resolve the important question of whether or not the offensive collateral estoppel doctrine, established by the Court in Parklane Hosiery Co. Inc. v. Sharp, 99 S. Ct. 645 (1979), applies to two prior orders of remand, which were entered in prior proceedings involving the Bhopal disaster,

the same defendants, the same subject matter on the merits and the same grounds with regard to removal/remand, so as to collaterally estop defendants in this case from opposing plaintiffs' motion to remand, thus requiring remand of this case to the state court of Texas?

VI.

Whether the Supreme Court should grant certiorari to resolve the important issue characterized by the Court of Appeals in this case as follows: "This appeal presents an extraordinary collection of issues, but we have concluded that we need reach only the threshold issue of plaintiffs' standing to dispose of the appeal. That issue is whether plaintiffs have standing to maintain this action in the courts of this country despite the Bhopal Act's

delegation to the Indian Government of the exclusive right to represent those injured in the Bhopal disaster."? The Court of Appeals referred to the issue as "one of first impression".

VII.

Wrapped up in the foregoing issue is the very important question of whether the settlement judgment in India, and the actions of the Indian Government, particularly in acting as the exclusive "representative" of a large class of tort victims, can be collaterally attacked in the American courts on grounds of inadequate notice, inadequate representation, absence of due process, absence of the right to opt-out, collusion, agreeing to a sweetheart settlement that is grossly inadequate, violation of the public policy of this

country or other grounds recognized as a basis for collateral attack with regard to representative proceedings, as expressed in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 2974 (1985); Hansberry v. Lee, 311 U.S. 32, 40, 61 S. Ct. 115, 117, 85 L.Ed 22 (1990); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 2152 (1974); and In Re Real Estate Title and Settlement Services Antitrust Litigation, 869 F.2d 760, 769, 770 (3rd Cir. 1990), and whether they can be collaterally attacked under the Foreign Money Judgment Recognition Act of Texas, Sect. 36.001-.008 of the Texas Civil Practice and Remedies Code and the principles enunciated in Hilton v. Guyot, 16 S. Ct. 139 (1895).

VIII.

Whether the Supreme Court should

grant certiorari with regard to the forum non conveniens dismissal in order to determine the important question which has long been pretermitted by this Court, see Gulf Oil v. Gilbert, 67 S. Ct. 839, 843 (1947) and Piper Aircraft v. Reyno, 454 U.S. 235, 102 S. Ct. 252, 262, (1981) - whether, under Erie v. Thompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 ALR 1487, the federal court should, in a diversity case, apply state forum non conveniens law where the application of federal forum non conveniens law would make a difference in the outcome? In connection with this issue, the question also arises as to whether certiorari is appropriate in order to achieve a uniformity of decisions among the federal courts by resolving the conflict between the opinion of Judge Learned Hand in Weiss

vs. Routh 149 F.2d 193 (2d Cir. 1945), holding that state forum non conveniens law should be applied by the federal courts under these circumstances, and the decisions of the district court in this case; the Fifth Circuit in In re Aircrash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated sub nom., Pan Am World Airways Inc. v. Lopez, 490 U.S. 1032, reinstated save as to damages under original nom., 883 F.2d 17 (5th Cir. 1989); and the Eleventh Circuit in Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir. 1985), holding that federal forum non conveniens law should apply under these circumstances.

XI.

Whether the Supreme Court should grant certiorari to resolve the important

question of whether, even if federal forum non conveniens law were deemed to apply, the prior forum non conveniens dismissal under federal forum non conveniens law can be res judicata of the forum non conveniens issue in this case, and whether the district court abused its discretion in granting the forum non conveniens motion, in the face of these undisputed facts:

(a) Since the dismissal in May of 1986 in the first Bhopal case, see In Re Union Carbide Corp. Gas Plant Disaster, 634 F.Supp. 842 (S.D. NY, 1986), aff'd as modified, 809 F.2d 195 (2nd Cir. 1987), cert. denied, 484 U.S. 871 (1987), the Indian Government, despite owning a substantial interest in one of the target defendants, Union Carbide of

India, Ltd. ("UCIL"), arrogated unto itself the alleged "exclusive right" to represent all of the Bhopal victims, without notice to them, without their consent, without their participation and without any right on their part to opt out; that, again without notice to the victims and over their vehement opposition, the Indian Government negotiated a grossly inadequate sweetheart settlement with itself (being both plaintiff and defendant); and, finally, with little fanfare, and again in the face of the vigorous opposition of the victims, the Indian Supreme Court approved such "settlement", even though it was fatally tainted with a pervasive conflict of interest and abuse of

fundamental due process, all of these facts thus compelling the conclusion that India is no longer an adequate alternative forum; and

(b) As to the private interest factors, plaintiffs stipulated that they would, in the American courts, use only American experts who of course would be easily accessible in the American forum; at their expense would bring the trial plaintiffs to the U.S. for depositions, trial and examination by experts of defendants' choice; and would pay the costs of defendants' counsel to go to India and other foreign countries to take the depositions of any relevant witnesses located there; plaintiffs contend that these stipulations, which were not made in the earlier

proceedings, drastically changed the crucial "balance of convenience" factor and that - consistent with this Court's ruling in Piper v. Reyno, supra, holding that defendants' stipulations to appear in the foreign court, etc. should be given weight in the forum non conveniens analysis - plaintiffs' stipulations should have been, but were not, given dispositive effect by the district court in this case.

LIST OF INTERESTED PARTIES

BANO BI, individually and on behalf of the children of Rashid Kahn, and as representative of the Estate of Rashid Kahn;

JAMEELA BI, individually and on behalf of her children and as representative of Estate of her husband, Deceased,

ABDUL SAHAKOOR,
individually and on behalf of Abdul Jahoor, his son,

GOO FRAN, individually and/or by and through his guardian, and as representative of the Estate Abrar Khan;

AJEEJA BI;

MOHAMMAD SAYEED;

SITARA ALI;

GAFFAR ALI;

M.D. SHAFIQ, individually and on behalf of his daughter, Afsan;

SUBER MOHAMMAD, individually and on behalf of his daughter, Shimilah;

MOHAMMAD ILIYAS, individually and on behalf of his daughter, Farhana;

M.D. SHAFIQ, individually and on behalf of his daughter, Shaifta;

SHAHEEN KAHN, daughter of the late Munney

SYED MAKSOOD ALI, son of Sed Imtiyaz Ali, all individually and on behalf of all those similarly situated,

ABDUL WAHID, ET AL;

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Because several thousand plaintiffs are involved in the Wahid case, the Clerk of this Court has granted Petitioners permission to file with the Clerk a 131 page document containing a complete list of the parties to this appeal. Petitioners have filed this document with the Clerk of the Court.

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UNION CARBIDE EASTERN, INC.;

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No. _____

In The Supreme Court of the United States

OCTOBER TERM, 1992

Bano Bi, Individually and on Behalf of the Children of Rashid Kahn, and as Representative of the Estate of Rashid Kahn, et al., and Abdul WAHID, et al.

Petitioners

against,

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., et al,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Bano Bi et al. and Abdul Wahid, et al. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 26, 1993.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

1. The order and opinion of the federal district court, dated February 20, 1992, denying the plaintiffs' motion to remand to state court and dismissing this case on ground of forum non conveniens, is attached as Appendix A, A1-23.

2. The opinion of the Court of Appeals, dated January 26, 1993, affirming the judgment of the district court and holding that the motion to remand should be denied and that dismissal was proper on the ground that the plaintiffs had no standing in the federal courts, is attached as Appendix B, A24-46.

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The final judgment of the Court of Appeals was entered on January 26, 1993. The petition for rehearing and rehearing

en banc was timely filed and overruled on March 26, 1993. App. C, A47, 48. This petition for writ of certiorari has been timely transmitted within ninety days of the order overruling the motion for rehearing and rehearing en banc. The jurisdiction of this Court is invoked under 23 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves the construction and application of 28 U.S.C. 1441(a) and 1447(c) of the removal/remand statutes; The Foreign Money Judgment Recognition Act of Texas, Section 36.001 - 36.008 of the Texas Civil Practice and Remedies Code; Section 71.031 of the Texas Civil Practice and Remedies Code; and the Bhopal Gas Leak Disaster (Processing of Claims) Act ("Bhopal Act") of India dated March 29, 1985 (attached App. K, A139 - 156).

STATEMENT OF THE CASE

As the Court of Appeals in this case correctly stated, "(o)n the night of December 2, 1984, the most devastating industrial disaster in history occurred when winds blew deadly gas from a plant operated by Union Carbide India Limited ('UCIL') into densely populated parts of Bhopal, India." A26, 27; Bano Bi v. Union Carbide, 984 F.2d 582, 583 (2nd Cir. 1993). Suits were initially filed in the federal courts and, on January 2, 1985, the Judicial Panel on Multidistrict Litigation assigned some 145 purported class actions filed in the federal district courts across the United States to the Southern District of New York, before Judge Keenan, where they became the subject of a consolidated complaint filed on June 28, 1985 (MDL 626).

On March 29, 1985, India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act ("the Bhopal Act") purportedly granting to its government ("Indian Government"), the exclusive right to represent the victims of the disaster in India or elsewhere. Pursuant to this authority, on April 8, 1985 the Indian Government, purportedly on behalf of all the victims of the Bhopal disaster, filed a complaint against the Union Carbide companies in the New York federal court and it became a part of MDL 626. In that suit, the Indian government made it clear that it preferred, on behalf of the victims, to have their rights litigated in the American courts because the Indian Government, at least at that time, did not consider India to be an adequate alternative forum for the Bhopal

litigation.

In the meantime, a group of Indian plaintiffs who did not want to be in federal court, and represented by undersigned counsel, filed suit in the state court of Texas. The suit was filed against Union Carbide Corporation ("UCC"), Union Carbide of India Ltd. ("UCIL"), Union Carbide Eastern Inc. ("UCE"), Enserch Corporation ("Enserch"), Humphries and Glasgow Consultants PVT, Ltd. ("H&GC"), Humphries and Glasgow, Ltd. ("H&G"), and Ebasco-Humphries and Glasgow, Inc. ("EH&G"). See Soni et al. v. Union Carbide Corporation, et al., Cause No. B-121, 140, 60th Judicial District Court of Jefferson County, Texas. UCIL, UCE, H&GC and H&G are alien defendants and Enserch and EH&G are in-state defendants, both being domiciled in Texas.

Alleging complete diversity of citizenship and that all of the alien and in-state defendants had been "fraudulently joined", the defendants twice removed the case to federal court. See App. D and E, A49 - 64. After full briefing on the question of fraudulent joinder, the federal district court twice remanded the case to the state court of Texas. See Orders dated February 20, 1984 and June 28, 1985, in Soni v. Union Carbide et al., (E.D. Tex.), Bmnt. Div., Nos. B-85-257-CA and B-85-846-CA respectively, App. F and G, A65 - 68.[1]

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[1] After remand, the Texas state court, acting before the Supreme Court of Texas had decided Dow Chemical Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990), erroneously dismissed without prejudice the Soni cases. As discussed below, the Alfaro decision clarified Texas forum non conveniens law and held that a suit filed under the Texas Open Forum Act, Sect. 71.031 of the Texas Civil Practices And Remedies Code, cannot be dismissed on

In the meantime, the MDL action was proceeding in New York. We need not repeat the procedural events that led to the decision of the federal district court in New York to dismiss all of the federal cases on ground of forum non conveniens; those proceedings are adequately described in the court's opinion. In Re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 844, 845 (S.D.N.Y. 1986). The plaintiffs appealed and the Court of Appeals affirmed the dismissal. In Re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2nd Cir. 1987) cert. den., 484 U.S. 871 (1987).

It is important to note a few of the excerpts from the Court of Appeals

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ground of forum non conveniens. Both the cases involved in this Petition, Bi and Wahid, were filed under the Texas Open Forum Act.

decision. The Court stated that "(b)asic justice dictates that both sides (of the Bhopal litigation) be treated equally", 809 F.2d at 205; that any judgment obtained in India will not be enforceable if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law", id. at 204; the Court pointed out that UCC had contended in the Court of Appeals that the "Indian courts ... do not observe due process standards that would be required as a matter of course in this country", id. at 204; that it (UCC) would be "seriously prejudice(d) ... if the Union of India (UOI) is permitted to have the double and conflicting status of both plaintiff and co-defendant in the Indian court proceedings", id. at 204 and 202;

and, finally, the Court expressly held that:

> "Any denial by the Indian courts of due process can be raised by UCC as a defense to the plaintiffs' later attempt to enforce a resulting judgment against UCC in this country."

809 F.2d at 205. Surely, since the Court of Appeals mandated that "both sides be treated equally", the right quoted above also accrued to the Bhopal victims.

It was undisputed that the Government of India had a substantial ownership interest in UCIL at all material times. 809 F.2d at 197. Despite this fact, in September of 1986 the Indian Government, for reasons not satisfactorily explained, reversed its position with regard to the American action and, allegedly acting pursuant to its authority under the Bhopal Act, brought suit on behalf of all claimants in the District Court of Bhopal,

India. The litigation continued in India for more than two years.

By orders dated February 14 and 15, 1989, the Supreme Court of India approved a settlement of "all litigations, claims, rights and liabilities related to and arising out of the [Bhopal] disaster." Union Carbide Corp. v. Union of India, 1989 [Supplement] S.C.A.L.E. 89, 90. Under the settlement, UCC and UCIL agreed to pay $470 million to the Indian Government purportedly for the benefit of all victims of the Bhopal disaster. Id. at 91. On December 22, 1989, in a related decision, the Court upheld the constitutional validity of the Bhopal Act and confirmed the Indian Government's exclusive authority to compromise all claims arising out of the Bhopal disaster. See Charan Lal Sahu v. Union of India,

1989 [Supplement] S.C.A.L.E. 1.

It is undisputed that the Indian Government, purportedly acting as representative of all of the Bhopal victims in the Indian litigation, never gave any kind of formal notice to any of the victims of the suit it was filing on their behalf; did not allow them to participate in the litigation; did not allow them the right to opt-out of the litigation and pursue their own causes of action; did not give them notice of the settlement negotiations or allow them to participate in such negotiations; and did not give them notice of the proposed settlement, did not give them a court-supervised opportunity to oppose the settlement (such as conducting the equivalent of "fairness hearings"), did not consult with them about the

settlement, and reached an agreement with itself (since it owned over 22% of the defendant UCIL and also purported to act for the plaintiffs) without the knowledge, participation or consent of the victims. See uncontradicted affidavits of Kim Laughlin and Abdul Jabbar Kahn, App. H, I and J, A69 - 138. Indeed, from the moment the grossly inadequate settlement was announced [2], the great majority of the victims have vehemently opposed it. Id.

After this grossly inadequate settlement was reached, two class actions were filed in the Texas state courts in

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[2] The affidavits had attached to them studies showing that a minimum of $1 billion would be needed just for medical care and hard damages (loss of income and property). Even though the settlement was reached in 1989, most of the victims have not received one dime to this date, and the very few who have received some compensation, have been paid only a pittance.

October, 1990, seeking compensation for injuries caused by the Bhopal disaster. In one action, the Wahid action, suit was filed against UCC and UCIL. In the other action, the Bano Bi action, suit was filed against UCC, UCIL, UCE, Enserch, H&GC, H&G and EH&G.

The defendants removed these actions to two Texas district courts in November, 1990. Their removal petitions contained the very same ground - diversity of citizenship and the charge that both of the in-state defendants and all four of the alien defendants had been fraudulently joined - that had been urged by the defendants in the two removals of the Soni cases. In the Bano Bi action, Judge Fisher of the Eastern District of Texas, the same judge who had previously entered the two orders in Soni - without giving

any reasons and without allowing the plaintiffs any opportunity for discovery - quickly dismissed the Enserch, H&GC, H&G and EH&G defendants[3] and then, almost as quickly - but still without permitting any discovery - denied the plaintiffs' motion to remand.[4]

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[3] The basis for such dismissal was a virtually unintelligible "Motion With Respect to Venue and to Dismiss". The motion did not seek dismissal of the alien defendants on ground of absence of in personam jurisdiction but sought dismissal on grounds of forum non conveniens, lack of "standing" and the like. The Enserch defendants did not file any affidavits or other evidence in support of their Motion, except to attach the Bhopal Act of 1985, which was not even attached in admissible form. See Jt. App. 1381-1392 of the Record in the Court of Appeals.

[4] Judge Fisher did not write an opinion or explain his reasons for either the dismissal of the Enserch defendants or the decision to deny remand. To be sure, it would be difficult for any court to find that there is "no possibility" that the plaintiffs could establish a right of recovery against the H&G in-state defendants in the state court in view of the finding by the Court of Appeals in the

The ground for removal of the Wahid action was, again, solely diversity of citizenship, with the conclusory allegation that UCIL had been fraudulently joined. The federal judge in the Wahid case did not act upon plaintiffs' motion to remand prior to both the Bano Bi and Wahid cases being removed to Judge Keenan's court in New York via the J.P.M.D.L.

Upon arrival in Judge Keenan's court, the defendants, in addition to their opposition to the motions to remand in

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first appeal that "60 Indian employees employed by the Bombay engineering firm of Humphreys & Glasgow supervised the design and installation of the Bhopal plant over the period of 1972 to 1980." 809 F.2d at 200. And as to the alien defendants, the only affidavits attached by defendants contained nothing more than conclusory "epithets" and certainly did not "clearly" negate "all possibilities" of establishing liability and/or in personam jurisdiction with respect to all of them.

both Wahid and Bano Bi, filed motions to dismiss on various grounds, including the ground of forum non conveniens. The plaintiffs filed the affidavits of Abdul Jabbar Khan and Kim Laughlin in support of their motion to remand and opposition to defendants' motion to dismiss. The plaintiffs also filed a motion asking Judge Keenan to reconsider the precipitate actions of Judge Fisher in dismissing the Enserch defendants in the Bano Bi case and in denying the motion to remand.

The Kahn and Laughlin affidavits established that India is not now an adequate alternative forum under federal forum non conveniens law and plaintiffs' proffered stipulations had the effect of rendering the U.S. a more convenient and adequate forum than India. See Jt. App. 461-465. The plaintiffs stipulated that

they would: (a) use only American expert witnesses on liability and damages, except for local doctors concerning treatment in India; (b) pay the costs of bringing the plaintiffs to the U.S. for depositions, trial and examination by American doctors and experts of defendants' choice; and (c) pay the costs of counsel for defendants to go to India to take relevant depositions there. Jt. App. 372-373.

On February 18, 1992, Judge Keenan summarily denied the motion to remand without giving any reasons, without discussing any of the removal-remand issues, without alluding to any law or authorities, and without explaining his decision. After stating that he would not rule on the other issues raised in defendants' motion because "(r)uling on

the substantive issues raised in their motion would require the Court to exercise jurisdiction over the actions", he held that he would not apply state forum non conveniens law (strangely without even citing or discussing Weiss v. Routh, 149 F.2d 193 (2nd Cir. 1945)); declined to accept the irrefutable fact that India had, by the manner in which the Indian Government had handled the Bhopal case, become an inadequate alternative forum; basically ignored plaintiffs' stipulations; and, essentially basing his decision upon his 1986 decision, again granted dismissal on ground of forum non conveniens. App. A1 - 23.

Despite the fact that forum non conveniens was the only ground relied upon by Judge Keenan for dismissal, the Court of Appeals went off on a different

tangent. It affirmed on the ground that the Bhopal Act had deprived the plaintiffs of any "standing" in the American courts. See A25 - 46 and Bano Bi v. Union Carbide, supra. The Court of Appeals finessed the remand issue by erroneously concluding that a remand would be "futile".

For the reasons stated in the "Questions Presented for Review", Petitioners seek this Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

A. Preliminary Statement.

This is truly a momentous case. It not only involves the last chance for the long-suffering Bhopal victims to secure genuine justice, but it also finds the sacred principle of federalism at a crucial cross-road.

There is almost total anarchy, from a global perspective, when it comes to multi-national corporations. The injustices resulting from this anarchy have been greatly facilitated by a doctrine called forum non conveniens. It is a remarkable doctrine. It judicially enables a defendant to claim with a straight face that it is not convenient for it to be sued in its home country, the country it has chosen for its international base of operations.

The doctrine has come to sanction outcome-determinative, reverse-forum shopping by defendants. Contrary to plaintiffs' forum selection, which aims to force a trial somewhere in this Nation (which is really the only country in the world judicially equipped to handle international cases), the multi-nationals

use the doctrine to force removal to a country where, realistically and for all practical purposes, the litigation never gets off the ground and the multi-nationals escape with far too little, or most often, no liability. See Justice Doggett's concurring opinion in Dow Chemical v. Alfaro, 786 S.W.2d 674, 682-688 (Tex. 1990).

After a number of lower federal courts virtually converted the discretionary doctrine of forum non conveniens into an absolute barrier to litigation in this country by foreign plaintiffs,[5] plaintiffs began filing suit

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[5] This Court has always made it clear that the application of the forum non conveniens doctrine is supposed to be discretionary. Gulf Oil v. Gilbert, 67 S.Ct. 839, 843 (1947) and Piper v. Reyno, 102 S.Ct. 252, 266 (1981). However, the lower courts subsequently created a chauvinistic exception to this Court's decisions in maritime cases, see Lauritzen

in the courts of states which either

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v. Larsen, 73 S.Ct. 921 (1953), Romero v. International Terminal Operating Co., 79 S.Ct. 486 (1959) and Hellenic Lines Ltd. v. Rhoditis, 90 S.Ct. 1731 (1970), by holding that, even where a vessel flies the American flag (or "flag of convenience") and/or is owned and operated by an American-based company, American law would not apply if the vessel is an offshore drilling vessel and the injured crewperson is a foreigner. Chiazor v. Transworld Drilling Corp., 648 F.2d 1015 (5th Circ. 1981) cert. den. 455 U.S. 1019 (1982); Vaz Borralho v. Keydril Co., 696 F.2d 379 (5th Cir. 1983 on reh'g. 710 F.2d 207 (5th Cir. 1983); Phillips v. Amoco Trinidad, 632 F.2d 82 (9th Cir. 1980) cert. den. sub nom, Romily v. Amoco Trinidad, 451 U.S. 920 (1981). Meanwhile, some circuits, notably the Fifth Circuit, took an increasingly hard line toward foreign plaintiffs vis-a-vis the forum non conveniens doctrine, a number of them threatening mandamuses or reversing and rendering in those rare instances when a district court might be brave enough to deny a forum non conveniens motion. See Munusamy v. McClelland Engineering, 579 F. Supp. 149 (E.D. Tex. 1984), mand. threatened in In Re McClelland Engineers, Inc. 742 F.2d 837 (5th Cir. 1984) and forum non conveniens denials reversed and rendered in McClelland Engineers, Inc. v. Munusamy, 784 F.2d 1313 (5th Cir. 1986) and De Oliveiro v. Delta Marine Drilling Co., 707 F.2d 843 (5th Cir. 1983).

greatly restricted or refused to recognize the forum non conveniens doctrine.

In response to this, federal courts, at the behest of the defendants, first tried to utilize injunctions to preclude state court actions. e.g. see Chick Kam Choo v. Exxon Corporation, 817 F.2d 307 (5th Cir. 1987) and Sherrill v. Brinkerhoff, 615 F. Supp. 1021 (N.D. Cal. 1985) rev'd in part, Zipfel v. Halliburton, 832 F.2d 1477 (9th Cir. 1987) cert. den. 486 U.S. 1054 (1988). But this Court quickly and properly disabused the federal lower courts of that approach. Chick Kam Choo v. Exxon Corporation, 486 U.S. 140, 108 S.Ct. 1684 (1988) reversing 817 F.2d 307.

However, the relentless assault upon federalism in the lower courts, rather than abating after Chick Kam Choo, has

intensified. Now the defendants are removing patently unremovable state-filed actions to the federal courts on the most frivolous of grounds. This case is a good example. There are two in-state defendants and four alien defendants, the presence of any one of which prevents complete diversity, the sole ground of removal by the defendants.[6] The defendants have utilized in this case what

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[6] 28 U.S.C. 1441(b) provides that the presence of just one in-state defendant precludes removal. All courts of appeals that have addressed the issue have uniformly held that the presence of one alien defendant (if at least some of the plaintiffs are also aliens) precludes removal on diversity grounds. Chick Kam Choo v. Exxon, 764 F.2d 1148 (5th Cir. 1983) (referred to as "Choo II", the second of three appeals) and Cabalceto v. Standard Fruit Co., 883 F.2d 1553 (11th Cir. 1989). This Court has never directly passed upon these holdings but they are based upon sound grounds, there is no conflict among the courts of appeals and there does not appear to be any reason for this Court to address that issue.

has come to be their rapier of removal, a frivolous charge that all of these six defendants were "fraudulently joined". Although this Court has not recently and comprehensively dealt with the question of "fraudulent joinder", some courts of appeals, notably the Fifth Circuit, at first laid down what we suggest is the proper criteria for dealing with the issue, namely the "no possibility" rule. See discussion infra. But recently, a split panel of the Fifth Circuit, as have the lower courts in this case, completely finessed the "no possibility" rule. See Villar v. Crowley Maritime Corp., 990 F.2d 1489 (5th Cir. 1993).

Even though the Fifth Circuit had previously strongly proclaimed that, in "fraudulent joinder" removals, the removing parties had the heavy burden of

showing clearly that there was "no possibility" that plaintiffs could establish a cause of action against any one of the in-state or alien defendants,[7] the Panel Majority in Villar affirmed the action of the district court in finessing that burden by going directly to the removing defendants' motions to dismiss all four of the alien defendants on ground of absence of in personam jurisdiction. See 990 F.2d at 1494-1495. This created a gigantic shift in burdens, from the extremely heavy "no possibility" burden on the removing defendants to a preponderance of the evidence or prima facie burden upon the removed plaintiffs.[8]

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[7] See discussion and citations under D. infra.

[8] See Thompson v. Chrysler Motors Corp, 755 F.2d 1162 (5th Cir. 1985) and Cutco Industries v. Naughton, 806 F.2d 361 (2d Cir. 1986), holding that the burden on

The district court, without allowing any discovery to the plaintiffs on the in personam jurisdiction motion,[9] quickly granted that motion first and then denied the plaintiffs' motion to remand. The district court then applied federal, rather than state forum non conveniens law, even though the application of federal law made a difference in the outcome. And, though deciding it would decline to accept federal jurisdiction on forum non conveniens grounds, it refused to order the case remanded to state court

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plaintiffs with regard to the in personam jurisdiction issue is "preponderance of the evidence" if the court conducts an evidentiary hearing and "prima facie case" if no evidentiary hearing is conducted.

[9]The failure of the district court to allow plaintiffs' discovery was the subject of a vigorous dissent by Judge Johnson. See 990 F.2d at 1500-1503.

and instead dismissed the case. These actions were all affirmed by the Panel Majority. Id. Thus, with total disregard for federalism and the Erie doctrine, the Panel Majority in Villar allowed the defendants to brutally strip the plaintiffs of their chosen state forum and law.[10]

What is important insofar as this Petition is concerned, is that what happened in Villar is, as can be seen from the Statement of the Case above, precisely what has happened in this case. Thus, the multi-national corporations based in this country have utilized a new judicial device, a new way around the now-banned use of injunctions, to prevent state courts from entertaining suits by foreign

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[10] Petition for rehearing and petition for rehearing en banc are presently pending in Villar.

plaintiffs against them. Tragically, that device involves an unprecedented expansion of federal judicial power and an unwarranted subversion of federalism, comity, the Erie doctrine and statutory limitations upon the removal jurisdiction of federal courts.[11]

B. **This Court Should, We Respectfully Suggest, Clarify International Primate and Resolve the Conflict Between The Decision of the Court Below In This Case, and the Decision of the First Circuit In M.A.I.N..**

Even if we assume arguendo that the Court of Appeals in this case was correct

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[11] It involves the use of a highly questionable ploy: after removing to federal court on the ostensible ground that the federal court has jurisdiction, these defendants have the audacity to immediately request that same federal court to use federal forum non conveniens law to decline such purported jurisdiction and, instead of the court remanding, as it should, such defendants get it to dismiss the case to the death sentence of a virtually non-existent foreign adjudication.

in holding that plaintiffs had no "standing" to bring suit in the federal court, it should have, in accordance with the decision of the First Circuit in Maine Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dept. of Human Services, 876 F.2d 1051 (1st Cir. 1989) (hereafter "M.A.I.N."), remanded this case to state court instead of dismissing.

In M.A.I.N., the First Circuit expressly held that the lower court's determination that the plaintiffs had no standing was the equivalent of "a determination that the district court lacked subject matter jurisdiction"; that "standing is (a) jurisdictional question"; and that "(h)ence, the literal words of the statute (28 U.S.C. 1447(c)) saying that the case 'shall' (not 'may') be remanded, require the court to remand this

case". 876 F.2d at 1053, 1054; emph. ours. The Court then made a statement that has since been seized upon as implying that there is a "futility exception" to 1447(c):

> "We think, however, that the district court erred in departing from the literal words of § 1447(c), which, on their face, give it no discretion to dismiss rather than remand an action. And, we are unwilling to read such discretion into the statute here because we cannot say with absolute certainty that remand would prove futile. It is conceivable, though unlikely, that M.A.I.N. will succeed in finding a state forum for its claims."

876 F.2d at 1054.

The Second Circuit in this case, after erroneously holding that the plaintiffs had no standing in the federal courts, see discussion under F. below, with little explanation apparently concluded it could avoid remand, despite its holding that plaintiffs had no standing, on the theory that, since "the

Texas courts ... would be obliged to reach the same conclusion regarding appellants' lack of standing that we have reached, a remand would be pointless." 984 F.2d at 586, 587. Though the Court of Appeals did not cite M.A.I.N. or this Court's decision in International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S.Ct. 1700 (1991) ("International Primate"), we respectfully suggest that this Court may have, by not unequivocally holding that the terms of 28 U.S.C. 1447(c) are mandatatory, given the Second Circuit the thought that it did indeed have the discretion to apply a "futility exception". That misconception may have arisen from this Court's discussion in International Primate of the M.A.I.N. decision. 111 S.Ct. at 1709,

1710.[12]

We therefore urge the Court to grant certiorari in this case in order to clarify the holding in International Primate and to resolve the conflict between M.A.I.N. and this case.[13] For

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[12] After holding that the state-filed case had been improperly removed under 28 U.S.C. 1442(a)(1) and noting that "a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of Sect. 1447(c)", 111 S.Ct. at 1709 (emphasis ours), the Court noted and rejected the removing party's contention that M.A.I.N. represented "authority for a futility exception" but then proceeded to discuss and hold that a remand to state court in International Primate would not be futile. 111 S.Ct. 1709, 1710.

[13] The federal court should not have the discretion, we submit, to utilize a "futility exception" because 1447(c) does not mention a "futility exception" and considerations of federalism, and the rule that the right to removal should be strictly construed, would also seem to militate against it. This Court stated many years ago:

other cases reflecting such confusion and conflict, see Migogna v. Sair Aviation, Inc., 937 F.2d 37, (2nd Cir. 1991) (acknowledging the possibility of a "futility exception" but without holding that one does exist) and Bell v. City of Kellogg, 922 F.2d 1418, 1424, 1425 (9th

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> "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"

Shamrock Oil & Gas Corp. v. Sheets, 61 S.Ct. 868, 872 (1941).

Cir. 1991) (citing M.A.I.N., the court applied a futility exception).[14]

C. **Wrapped Up In The Foregoing Issue, and Permeating Almost All The Issues in This Petition, Is The Important Issue of Whether, In a Removal Case, The First Motion The District Court Should Address Is Plaintiffs' Remand Motion.**

We have discussed in the Preliminary Statement how it has become a recent trend of the lower courts to finesse the remand motion by considering other motions first.

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[14] Even if a "futility exception" were potentially available, for the reasons discussed in International Primate, including its important statement that "plaintiff's lack of Article III standing would not necessarily defeat its standing in state court", 111 S.Ct. at 1710, and discussed in M.A.I.N., 876 F.2d at 1051, it is clear that the Court of Appeals erred in this case in holding that remand to the state court of Texas would be futile, particularly in view of Texas state law on standing. See Texas Open Courts constitutional provision, art. I, § 13, Texas Constitution, and the deference given it by the Court in Pennzoil v. Texaco, 107 S.Ct. 1519, 1528-1529 (1987) and Chick Kam Choo v. Exxon, 108 S. Ct. 1684, 1688-1689 (1988).

With regard to this issue, the courts of appeals are in direct conflict. Along with the district court in this case, the Fifth Circuit, in Walker v. Savell, 335 F.2d 536 (5th Cir. 1964) and Villar, 990 F.2d at 1494-1495, has held that the district court may take up other motions, including in personam jurisdiction dismissal motions, before addressing the motion to remand, while the Seventh Circuit has held just the opposite. Allen v. Ferguson, 791 F.2d 611, 615, 616 (7th Cir. 1986).

The court in Allen stated:

> "(W)hen a suit is removed on the basis of diversity of citizenship, the district court should verify the essence of subject-matter jurisdiction at the outset of the litigation if it appears that complete diversity is lacking."

791 F.2d at 615, 616; emphasis ours.

Noting that "federalism concerns tip

the scales in favor of initially ruling on the motion to remand," the court then held that "the district court erred in deciding Ferguson's motion to dismiss for want of personal jurisdiction before determining whether there was complete diversity." Id. at 615, 616. See also, Buyout v. Auto Club Ins. Assn., 704 F. Supp. 1060 (N.D., Ga., 1989) (citing and adopting Allen v. Ferguson); Armstrong v. Alabama Power Co., 667 F.2d 1385, 1388 (11th Cir., 1982);[15]

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[15] In a very articulate statement of the rationale for the holding in Allen V. Ferguson, the court in Armstrong stated:

> "The answer lies in the nature of removal jurisdiction--which is simply a method of transferring into federal court a state court suit containing a federal jurisdictional ground. It also lies in the balance between federal and state judicial power--a balance that requires the federal courts to give '(d)ue regard for the rightful independence of state governments' and to 'scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Romero

BancOhio Corp. v. Fox, 516 F.2d 29 (6th Cir. 1975); and Jones Store Co. v. Hammon, 424 F.Supp. 494, 499 (W.D. Mo. 1977.)

We urge this Court to intervene and resolve the conflict between the Seventh, Second and Fifth Circuits on this important issue and hold clearly and unequivocally that, as held in Allen, a district court must always address the motion to remand first and determine whether it has subject matter jurisdiction. "The first order of

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> v. International Terminal Operating Company, supra, 358 U.S. at 380, 79 S.Ct. at 484, 3 L.Ed.2d at 386. Finally, it preserves the plaintiff's right to choose a state forum. To serve these purposes, the federal courts must carefully scrutinize the bounds of removal jurisdiction, even to the point of apparently impractical detail--for these details in the given case eventually guarantee higher goals in all cases."

667 F.2d at 1388.

business is for the federal court to determine its own jurisdiction". 1A Moore's Federal Practice, §0.129 [1] pp. 678, 679.

D. **The Court Should, We Respectfully Suggest, Intervene By Way of Certiorari In Order To Clarify The Standards and Burdens In Fraudulent Joinder Removals And How Those Standards Should Be Applied In Cases Such As This One.**

The standard and burden in fraudulent joinder removals has been defined in different ways by different courts. The standards and burdens incident to the "no possibility" rule adopted by the Fifth Circuit is well stated in Green v. Amerada Hess Corp. 707 F.2d 201 (5th Cir. 1983):

> "The burden of proving a fraudulent joinder is a heavy one. The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts. . . . .

> Having assumed that all other facts alleged by the plaintiff in his complaint are true, the court must then examine relevant state law and resolve all uncertainties in favor of the nonremoving party. Id. at 550. Viewing the state law in its proper perspective, if there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendants have been properly joined, that there is incomplete diversity, and that the case must be remanded to the state courts."

707 F.2d at 205, 209; emphasis ours. See also East Texas Mack Sales v. Northwest Accept. Corp., 819 F.2d 116 (5th Cir. 1987); B. Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981); and Laughlin v. Prudential Ins. Co., 882 F.2d 187 (5th Cir.1989).

This Court has framed the standard in more general terms, stating that a fraudulent joinder must be shown by "facts rightly leading to that conclusion (that

the joinder was fraudulent) apart from the pleader's deductions". Wilson v. Republic Steel, 42 S.Ct. 35 (1921). The Second Circuit has stated that the "proof of fraud must be clear and convincing". Norwalk v. Air-Way Electric Appliance Corp., 87 F.2d 317, 320 (2d Cir. 1937).

In the final analysis, the charge of "fraudulent joinder" is a serious one and should not be tolerated unless the removing party can back it up with virtually conclusive proof. This is why we believe it is in the interest of justice and stare decisis for the Court to grant certiorari and adopt the "no possibility" rule as expressed in the earlier Fifth Circuit decisions in Green, Laughlin and East Texas Mack Sales.

How should that rule be applied in cases such as this one? As explained by

Green, et al, the first thing the district court should have done in this case (both Judge Keenan and Judge Fisher) was to examine Texas law to determine what the "possible" theories were, by which in personam jurisdiction could be asserted over the alien defendants. Within the constitutional limitations set by this Court, see Hall v. Helicopteros Nacional, 104 S.Ct. 1868, 1872 (nte. 3) (1984), the Texas Courts are very liberal.

For example, it is well established that a parent company may maintain the requisite jurisdictional contacts for its subsidiaries and vice versa. Reaul v. Sahara Hotel, 372 F. Supp. 995 (S.D Tex. 1975); Walker v. Walker, 583 F.2d 163, 167 (5th Cir. 1978) and Taca Int'l Airlines v. Rolls Royce of England, 204 N.E.2d 329 (N.Y. App. 1965). And in Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986)

the court laid down several ways in which the parent company's relationship with its subsidiaries could justify the holding that in personam jurisdiction over the parent would constitute in personam jurisdiction over the subsidiary. This occurs through concepts of joint contacts, alter ego, agency and other means. Castleberry described a number of theories for "disregarding the corporate entity" such as where the separate corporate relationship of the subsidiary has been used "to achieve an inequitable result"; "as a mere tool or business conduit" of the parent; as "a sham or to perpetrate a fraud"; where the subsidiary has "inadequate capitalization"; or where there has been a transfer of assets out of the subsidiary after the incident made the basis of the suit has occurred.

Castleberry,[16] 721 S.W.2d at 272; Gentry v. Credit Plan of Houston, 528 S.W.2d 571 (Tex. 1985); and Torregrossa v. Szelc, 603 S.W.2d 803 (Tex. 1980).

As to the agency or quasi-agency theories, there are a number of cases which hold that subsidiaries or related

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[16] Indeed, the Panel Majority in Villar raked plaintiff's counsel over the coals, and even sanctioned him, for relying "on Castleberry, 721 S.W.2d at 270, despite the fact that this case had been legislatively overruled four years earlier." p. 4381, Slip. Op. As authority for that statement, the Panel Majority cited Farr v. Sun World Sav. Assn., 810 F.2d 294 (Tex. App. - El Paso 1991). It is obvious that the Panel Majority did not read this case because if it had it would have read the following: "As can readily be seen, the amendments to Article 2.21A effectively eliminated constructive fraud and the failure to observe corporate formalities and requirements...in connection with contract claims, but left untouched the effect of constructive fraud on tort." 810 S.W. 2d at 296, emphasis ours. Since Villar was indisputably a tort case, the rules announced in Castleberry very much applied to Villar, just as they apply to this case.

parties are subject to the in personam jurisdiction of the forum court because of the presence of a principal, parent or quasi-principal.[17]

In this case, as in Villar, the district courts completely denied the plaintiffs an opportunity to engage in discovery with regard to whether any of the four alien entities fit into the mold

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[17] See Rittenhouse v. Mabry, 832 F.2d 380 (5th Cir. 1987) (the contacts of a physician, who was present in the forum, were attributed to a nonresident professional corporation for in personam jurisdiction purposes); Hitt v. Nissan Motor Company, Ltd., 399 F. Supp. 838, 846, 847 (S.D. Fla. 1975); Hargrove v. Fibreboard, 710 F.2d 1154, 1159 (5th Cir. 1983) ("it has long been recognized . . . that in some circumstances a close relationship between a parent and its subsidiary may justify a finding that the parent 'does business' in a jurisdiction through the local activities of its subsidiaries"); Beecham v. Pippin, 868 S.W.2d 356 (Tex. App.-Austin 1985, nc writ); Reaul v. Sahara Hotel, supra; and Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 419 (9th Cir. 1977).

of any of the alter-ego, agency, quasi-agency or joint contact theories for finding in personam jurisdiction over a subsidiary. In doing so, the district court in this case (with the tacit acquiescence of the Second Circuit) and the Panel Majority in Villar have flagrantly challenged what at one time was considered hornbook law - that if a court refuses to allow discovery on motions such as in personam jurisdiction dismissal motions it will be reversed.[18]

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[18] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (n. 13), 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978); Skidmore v. Syntex Laboratories, Inc., 529 F.2d 1244, 1248-49 (5th Cir. 1976); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1146 (5th Cir.) (en banc), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973); Herbert v. National Academy of Sciences, 974 F.2d 192 (D.C. Cir. 1992); and see the dissent in Villar, 990 F.2d at pp. 1500-1503.

Thus, through a combination of frivolous removals[19] based upon fraudulent joinder, a finesse of the heavy fraudulent joinder burdens upon defendants

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[19] We have already mentioned the finding of the Second Circuit in the first Bhopal appeal that the Humphreys & Glasgow (Enserch) defendants were involved in the construction and maintenance of the Bhopal plant, and how Enserch and EH&G have a strong presence in Texas because they have their home offices there. UCC also has a strong presence in Texas. It has plants and offices in Garland, Seadrift, Houston and a vinyl chloride plant in Texas City; and the MIC produced by UCC (this was the gas which exploded and escaped at Bhopal) is used in the production of pesticides at its Texas City plant.

In view of the strong presence of the Enserch and Union Carbide multi-national parents in Texas, it is clear that the defendants did not meet their heavy burden of clearly negating every "possibility" that a Texas court could find in personam jurisdiction with regard to at least one of the alien defendants or liability against at least one of the in-state defendants. And had plaintiffs been allowed the discovery they were entitled to, plaintiffs could probably have established a right of recovery against the alien and/or in-state defendants by a preponderance of the evidence.

by erroneously deciding other motions first, and the refusal to grant discovery to plaintiffs on those motions, the district courts in this case and in Villar have succeeded in making a mockery of federalism. It appears that this ominous trend - of improperly expanding federal judicial power in removal cases involving foreign plaintiffs - is going to continue unless this Court grants certiorari, as it did in Chick Kam Choo, and imposes its solemn shield against this onslaught against federalism.

E. **Certiorari Should Be Granted To Decide The Question Whether A Federal Court In A Removal Case, Once It Determines That It Is Going to Decline Jurisdiction On Forum Non Conveniens Grounds, Should Remand To State Court Rather Than Dismissing.**

This Court has never decided the above stated issue. There is a general line of authorities holding that, in situations where a removal court decides

it is going to decline jurisdiction on ground of forum non conveniens, it should remand rather than dismiss.

In 76 C.J.S., Removal of Cases, § 266, the rule is well-stated:

> "A cause previously removed from a state court to a federal court should not be dismissed by such court because its jurisdiction is lacking or has ceased to exist; nor should it be dismissed under the doctrine of forum non conveniens, but it should be remanded to the state court . . ."

76 C.J.S. at 1124, emphasis ours. See also Murray v. Union Pac. Ry. Co., 77 F.Supp. 613, 614 (D.C. Ill. 1948); Buroes v. Proctor & Gamble Defense Corp., 172 F.2d 541 (5th Cir. 1949); and Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974).

Professor Moore explains why the rule applied in Murray and the cases cited above is the only just way to handle a case removed from state court when the

federal court elects not to accept jurisdiction on the basis of the doctrine of forum non conveniens:

> "If the federal court to which the action is removed is not prepared to go forward with the case and there is no convenient federal venue to which the suit can be transferred, then, to our mind, simple justice requires a remand to the state court so that it can go forward with the case or dismiss it, as it sees fit. The doctrine of forum non conveniens is a procedural, not a jurisdictional doctrine; and the federal court should not impose its procedural doctrine upon a plaintiff who did not invoke its jurisdiction, for the purpose of preventing an adjudication in both federal and state forums. The purpose of removal jurisdiction is to give a defendant, in certain cases, a right to trial in a federal forum, not a means of escaping trial in both state and federal forums."

1A Moore's Federal Practice, Removal Procedure, § 0.169 [1], pp. 684, 685; emphasis ours. [20]

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[20] While, as we noted above, this Court has never addressed the issue, it has decided, in a somewhat analogous situation, that a federal court can remand rather than dismiss, where it declines

In addition to the rulings of the lower courts in this case, there are other decisions which are in conflict with the above authorities and hold that a federal court can dismiss a removed case rather than remanding, even though it has decided to decline jurisdiction on ground of forum non conveniens. See e.g. Nolan v. Boeing, 919 F.2d at 1070, and Villar, 990 F.2d at 1497-1498.

We submit that the Court should grant certiorari and resolve the conflict on this important issue in the manner suggested by Professor Moore.[21]

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discretionary jurisdiction. See Carnegie-Mellon v. Cohill, 108 S.Ct. 614, 621, 622 (1988) (involving pendent jurisdiction situations).

[21] Another important issue ignored by the courts below is whether the remand orders in Soni are entitled to offensive collateral estoppel effect. In Soni, the defendants had a "full and fair opportunity" to litigate the same removal/remand issues that are present in

F. **The Court Should Grant Certiorari With Regard To The Issue The Court of Appeals Deemed Controlling: Whether The Bhopal Act, Purportedly Making The Indian Government The Exclusive Representative of The Bhopal Victims, Deprived The Plaintiffs Of Standing In The Courts Below.**

The burden was upon the defendants to prove that the act of state doctrine[22] or its rationale is applicable to this case. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 694-95, 96 S. Ct. 1854, 1861-62 (1976) and Liu v. Republic

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this case and lost. Thus, they should be collaterally estopped to oppose remand in this case. See Parklane Hosiery Co. Inc. v. Shore, 99 S.Ct. 645 (1979).

[22] The Court in W. S. Kirkpatrick v. Environmental Tectonics, 493 U.S. 951, 110 S. Ct. 701, 704 (1990) stated the doctrine applies where "the relief sought or the defense interposed would have required a court of the United States to declare invalid the official act of a foreign sovereign performed within its own territory."

of China, 892 F.2d 1419, 1432 (9th Cir. 1989). The defendants utterly failed to meet their burden in several respects and there are several cases which make it clear that neither the act of state doctrine, nor any similar doctrine, applies in this case. These include Liu, supra; Timberlane Lumber Company v. Bank of AM. M.T. and S.A., 549 F.2d 597, 607-608 (9th Cir. 1976); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923 (1964); Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980); Boland v. Bank Sepa-Iran, 614 F.Supp. 1166 (E.D.N.Y. 1985); W.S. Kirkpatrick v. Tectonics, supra; Lamb v. Phillip Morris Inc., 915 F.2d 1024 (6th Cir. 1990); Randall v. Arabian American Oil Co., 778 F.2d 1146 (5th Cir. 1986); Veitz v. Unisys Corp., 676 F.Supp. 99 (E.D. Va. 1987); Richmark Corp. v. Timber Falling Consultants, 959

F.2d 1468 (9th Cir. 1992); Faysound Ltd. v. Walter Fuller Aircraft Sales, Inc., 748 F.Supp. 1365 (E.D. Ark. 1990); International Association of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981) cert. den. 102 S.Ct. 1036 (1982); Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965) cert. den. 86 S.Ct. 648 (1966); and Filartiga v. Pena-Irala, 577 F.Supp. 860 (E.D.N.Y., 1984). These cases establish that: First, India was not "acting in the public interest" in its dealings with the Bhopal Act (it was acting in its own interest in view of its substantial ownership in UCIL). [23] Second, the provision of the Bhopal Act that the

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[23] See Liu, 892 F.2d at 1432; Timberlane, 549 F.2d at 607-08; and Dominicus Americana Bohio v. Gulf & Western, 473 F.Supp. 680, 690, 698 (S.D.N.Y. 1979).

alleged exclusive right on the part of the Indian Government to represent the victims applies extraterritorially - i.e. outside of India - cannot have any effect under the act of state doctrine or its rationale. [24] Third, the provision in the Bhopal Act concerning "exclusive representation" is not an "act of state". [25] And, fourth, transactions about which

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[24] See Sabbatino, 376 U.S. at 400-01; Liu, at 1432, 1434; Letelier, 488 F.Supp. at 673. As the court in Boland stated: "The doctrine does not preclude such a judgment when the act in question concerns a thing or interest located beyond the confines of the foreign state's territory. Restatement (Second) of Foreign Relations § 43(1) (1965). ... The determining factor is where the act comes to fruition ... If the act does not come to complete fruition within a foreign state then the Act of State Doctrine will not be applied." 614 F.Supp. at 1173; emphasis ours.

[25] Kirkpatrick, 110 S.Ct. at 705; Lamb, 915 F.2d at 1026-1027; Randall, 778 F.2d at 1150 (law of foreign country cannot unilaterally curtail power of U.S. federal courts to hear dispute even though

there is a reasonable "degree of international concensus" are not subject to the act of state doctrine or its rationale (there is definitely a global concensus with regard to tort law - negligence, proximate cause and damages).[26]

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dispute involves rights fixed by laws of another nation); Veitz, 676 F.Supp at 102 ("Saudi labor law exclusivity provisions do not bar American courts' jurisdiction to hear a matter based upon Saudi labor law benefits"); Faysound, 748 F.Supp. at 1370-74 (foreign judicial judgment in case involving private litigants does not rise to status of act of state); and Richmark, 959 F.2d at 1474-77 (federal district court's discovery orders upheld despite the fact that law of People's Republic of China precluded the requested disclosures).

[26] See Sabbatino, 84 S.Ct. at 940; OPEC, 649 F.2d at 1361; and Liu, 8902 F.2d 1433. Furthermore, when the ultimate event occurs "within the United States" our courts will give effect to acts of state only if "they are consistent with the policies and law of the United States". Liu, 892 F.2d at 1433 and Republic of Iraq, 353 F.2d at 51.

There are other reasons why the act of state doctrine or its rationale do not apply in this case. The Bhopal settlement judgment was the consummating act and collateral attacks upon such foreign judgments are permitted by the Texas Uniform Foreign Money Judgment Act, Sect. 36.001-008 of the Texas Civil Practices and Remedies Code, and by the doctrine enunciated in Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139 (1895). The plaintiffs had "standing" to collaterally attack the settlement judgment entered in India, and the acts leading up to it, for absence of due process and/or impartiality, for fraud in the procurement of the judgment and for proceedings that "were repugnant to the public policy of the state (Texas)."

Finally, since the proceedings in India were "representative" proceedings, the plaintiff had standing to collaterally

attack those proceedings, including the purported settlement, on grounds of inadequate notice, inadequate representation, collusion, no right to opt-out, that the settlement was grossly inadequate, the presence of conflicts of interest and other abuses of due process. Phillips Petroleum v. Shutts, 105 S.Ct. 2965, 2974 (1985); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174-5, 94 S.Ct. 2140, 2151 (1974). Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115 (1940); In re Real Estate Title and Settlement Services Antitrust Litigation, 869 F.2d 760, 769-70 (3d Cir. 1990); and Ficalora v. Lockheed California Co., 751 F.2d 995, 996, 997 (9th Cir. 1985).[27]

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[27] There are a number of fact issues incident to the "standing" and "act of state" questions, which mesh with the issues to be tried on the merits of the case; therefore those issues should have been deferred to the trial on the merits

G. **The Court Should Grant Certiorari To At Long Last Resolve the Issue Of Whether Federal or State Forum Non Conveniens Law Applies In a Diversity Case In Federal Court, When The Resolution Of That Issue Makes a Difference In The Outcome.**

As we noted above, this Court has long pretermitted the resolution of the above stated issue. See Gulf Oil v. Gilbert, 67 S.Ct. 839, 843 (1947) and Piper Aircraft v. Reyno, 102 S.Ct. 252, 262 (1981). The reason the Court deferred the issue in Gilbert and Reyno is that there was no difference between federal and state forum non conveniens law in those cases. As we have explained above, there is the difference of life and death[28] between

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rather than the Court of Appeals ordering dismissal. Herbert v. National Academy of Sciences, 974 F.2d 192, 198 (D.C. Cir. 1992).

[28] By "life" we mean that, under Texas forum non conveniens law, the plaintiffs will get a trial on the merits in a Texas Court; by death we mean that, under federal forum non conveniens law,

federal and Texas state forum non conveniens law. See Dow Chemical Co. v. Alfaro, supra, 786 S.W.2d at 678.

In Weiss v. Routh, 149 F.2d 193 (2nd Cir. 1945), the Second Circuit, in an opinion by the distinguished Judge Learned Hand, held that a federal court sitting in diversity, after removal from state court, must, in determining the forum non conveniens issue, apply state forum non conveniens law if the outcome would be different had the court applied federal forum non conveniens law. 149 F.2d at 195. See also Medow Industries, Inc. v. Kirsch Company, Inc., 356 F. Supp. 52, 55 (S.D. N.Y. 1973).

In two other circuits, the courts have held that a federal court sitting in

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the case will likely be sent off to a foreign jurisdiction, where it will die a slow death.

diversity should apply federal forum non conveniens law. Sibaja v. Dow Chem Co., 757 F.2d 1215 (11th Cir. 1985) and In re Air Crash Near New Orleans, La., 821 F.2d 1147 , 1154 - 1159 (5th Cir. 1987) (en banc). However, neither of those cases involved causes that had been removed from state court, whereas Weiss v. Routh was a removed case.[29]

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[29] The reason the "removal" ingredient provides a more compelling case for application of state forum non conveniens law, as was held in Weiss v. Routh, is that the forum non conveniens doctrine centers upon "choice of forum" by the plaintiffs. See Gulf Oil v. Gilbert, 67 S.Ct. at 843. In this case, as in Weiss, the plaintiffs chose the state forum, not the federal forum. That choice of forum, and the outcome plaintiffs would obtain in the chosen forum, must be honored. That is the essence of the Erie doctrine as Judge Hand recognized in Weiss v. Routh, 149 F.2d at 195. See Pennzoil v. Texaco, 107 S. Ct. 1519 (1987) and Chick Kam Choo, supra 108 S. Ct. at 1684, 1691, holding that the Texas courts are fully capable of resolving the relevant issues, including those relating to forum non conveniens.

In Guaranty Trust Co. v. N.Y., 65 S. Ct. 1464 (1945), this Court held that, "putting to one side abstractions regarding 'substance' and 'procedure'", it would apply the Erie doctrine "with an eye alert to essentials in avoiding disregard of state law in diversity cases in the federal courts" and would apply state law, even if labeled "procedural", if the failure to do so would result in a different "outcome" in the federal court. Id. at 1469-70.

We urge the Court to grant certiorari on this issue in order to resolve the conflicts among the circuit courts and thus maintain uniformity and in order to preserve the integrity of the Erie doctrine and federalism.

H. **Even If Federal Forum Non Conveniens Law Were To Apply, There Are Two Important Considerations The Court Should Review By Way Of Certiorari: Whether, Under The Circumstances of**

This Case, India Is Still An Adequate Alternative Forum And Whether, In View of Plaintiffs' Stipulations, The Balance Of Private Interest Factors Now Compels Denial Of The Forum Non Conveniens Motion.

Since the dismissal by Judge Keenan in 1986, see 634 F. Supp. 843, India has thoroughly demonstrated that it is not an adequate alternative forum. The uncontradicted affidavits of Abdul Kahn and Kim Laughlin outlining the events since then establish that the Indian court system has sanctioned a series of legislative and judicial acts that defy all notions of due process.

If, under all the circumstances of this case - the shocking conflict of interest and the dire consequences that followed - India can still be considered an adequate alternative forum, then, in reality, there is no such thing as an inadequate forum. See Mercier v. Sheraton Intern, Inc., 935

F.2d 419, 425, 426 (1st Cir. 1991) (holding that the defendant as a matter of law failed to meet its burden of establishing that Turkey was an adequate alternative forum).

As to the private interest factors, the plaintiffs' stipulations in this case, which were not before the courts in the earlier Bhopal case, drastically shift the balance of convenience. Most courts, as did the lower courts in this case and the court in Villar, though they hasten to accept stipulations from the defendants, which are designed to make a dismissal palatable, completely ignore the plaintiffs' stipulations. This is erroneous and perhaps a violation of "equal protection."[30]

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[30] For examples of the recognition of stipulations by plaintiffs, see Irish National Insurance Co., Ltd. v. Aer Lingus Teoranta, 739 F.2d 90, 92 (2d Cir. 1984)

CONCLUSION and PRAYER

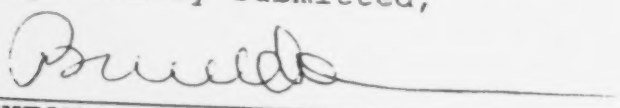
Here we have a constellation of several important questions which, taken together, profoundly affect the very fabric of federalism, comity, removal/remand law, the Erie doctrine and the delicate balance between the state and federal court systems. Therefore, we respectfully pray the Court to grant certiorari upon each and every one of the questions presented.

Dated: Houston, Texas

("... we do not share the district court's concern about the possibility that appellees' counsel might have to fly to Ireland to take testimony, especially since appellant has indicated its willingness to pay the expense of such attendance." 739 F.2d at 92; emphasis ours) and Costa v. Textron, No. CA-4-81-23b (N.D. Tex., 1984) (in Costa the court denied the forum non conveniens motion because of plaintiffs' stipulations.)

July 8, 1993 (as permitted replacement for Petition originally submitted on June 24, 1993)

Respectfully submitted,



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